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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**

8 JOSE LARA ESTRADA; HILDA
9 RIVAS-QUINTERO,

10 Petitioners,

3:06-cv-0694-BES-RAM

11 vs.

ORDER

12 MICHAEL CHERTOFF, *et al.*,

13 Respondents.
14 _____/

15 Introduction

16 This action is a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2241,
17 regarding an immigration matter. The petitioners, husband and wife, seek to revive their rights
18 to appeal a final administrative order of removal.

19 The Court, fully apprised of the premises, and good cause appearing, will grant
20 petitioners a writ of habeas corpus, and direct the Board of Immigration Appeals (BIA) to
21 reissue the order of removal, such that petitioners have an opportunity to initiate a timely
22 appeal.

23 Background Facts

24 Petitioners are natives and citizens of Mexico, who entered the United States, without
25 inspection, in 1988 and 1989. Application for Writ of Habeas Corpus (Petition) (docket #1),
26 p. 3. In 2000, removal proceedings were initiated against petitioners, and a hearing was

1 conducted before an Immigration Judge (IJ) in 2005. *Id.* At the conclusion of the hearing, the
2 IJ denied petitioners' claims for relief from the proposed removal. *Id.*

3 Petitioners thereafter sought review of the IJ's decision through a timely appeal to the
4 BIA. *Id.* The BIA affirmed the decision of the IJ. *Id.* at 4. Following the adverse ruling by the
5 BIA, petitioners retained counsel to file a petition for review with Ninth Circuit Court of Appeals.
6 *Id.* However, counsel filed the petition for review one day late in the Court of Appeals, and it
7 was, as a result, dismissed on December 6, 2006. *Id.*

8 On December 15, 2006, petitioners filed his Application for Writ of Habeas Corpus
9 (docket #1), initiating this action. Respondents filed an Answer (docket #3) on January 16,
10 2007.

11 On January 29, 2007, petitioners filed an "Opposition to Respondents' Response to
12 Application for Writ of Habeas Corpus Seeking Dismissal" (Reply) (docket #4).

13 On February 21, 2007, respondents filed a Notice of Additional Authorities
14 (docket #5). On February 23, 2007, petitioners filed a response to that Notice of Additional
15 Authorities (docket #6).

16 On March 21, 2007, petitioners filed a Notice of Ruling in a Related Case (docket #7),
17 giving notice that this Court had ruled – and had granted a writ of habeas corpus – in a
18 somewhat similar case, involving another petition for review, filed late by the same attorney.
19 The related case is *Martinez v. Chertoff*, 3:06-cv-0672-BES-VPC.

20 On April 5, 2007, respondents filed a "Supplemental Response to Application for Writ
21 of Habeas Corpus and Motion to Dismiss Application" (Supplemental Response and Motion
22 to Dismiss) (docket #8). On April 8, 2007, petitioners filed an opposition to the Supplemental
23 Response and Motion to Dismiss (docket #9). On April 23, 2007, respondents filed a reply in
24 support of their Supplemental Response and Motion to Dismiss (docket #10).

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1 On July 23, 2007, respondents filed a second Notice of Additional Authority (docket
2 #12). Petitioners filed a response to respondents' second Notice of Additional Authority
3 (docket #13) on July 25, 2007.

4 On September 10, 2007, petitioners filed a Notice of Additional Authority
5 (docket #15).

6 The Court has examined all of the extensive briefing and the authorities submitted by
7 the parties, and rules as follows.

8 Analysis

9 A. Exhaustion of Administrative Remedies

10 Respondents argue that petitioners failed to exhaust their available administrative
11 remedies because they did not make a request to the BIA to reissue the order of removal.

12 A petitioner seeking habeas corpus relief under section 2241 is required to first exhaust
13 administrative remedies. *United States v. Pirro*, 103 F.3d 297, 299 (9th Cir. 1997). However,
14 it is not necessary that such a petitioner seek relief through discretionary avenues, such as
15 the motion to reopen the BIA action that respondents appear to contemplate here. See
16 *Castro-Cortez v. INS*, 972 F.2d 1017, 1023-24 (9th Cir. 1992).

17 B. Custody

18 Next, respondents argue that petitioners are not in custody, and is, therefore, not
19 entitled to habeas corpus relief.

20 A petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2241, is available to a
21 petitioner if he or she is in federal custody in violation of the Constitution or laws or treaties of
22 the United States. 28 U.S.C. § 2241. In certain circumstances, restraints short of physical
23 confinement may be considered "custody" for purposes of the federal habeas corpus statutes.
24 See *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). A person subject to a final order of is
25 considered to be in custody for purposes of habeas corpus. *Rosales v. ICE*, 426 F.3d 733,

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734-36 (5th Cir. 2005); *Nakaranurack v. United States*, 68 F.3d 290, 293 (9th Cir. 1995); *Guti v. INS*, 908 F.2d 495 (9th Cir. 1990).

C. REAL ID Act

On May 11, 2005, the REAL ID Act of 2005 (Pub. L. No. 108-13, 119 Stat. 231) went into effect. The Act expanded the jurisdiction of the federal courts of appeal over judicial review of final orders of removal, making “the circuit courts the ‘sole’ judicial body able to review challenges to final orders of deportation, exclusion or removal.” *Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1052 (9th Cir. 2005). Toward this end, the Act amended 8 U.S.C. § 1252(a)(5), to read as follows:

(5) Exclusive means of review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e) of this section. For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms “judicial review” and “jurisdiction to review” include habeas corpus review pursuant to section 2241 of Title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

8 U.S.C. § 1252(a)(5). “To accomplish this streamlined judicial review,” the Act eliminated habeas jurisdiction, including jurisdiction under 28 U.S.C. § 2241, over petitions seeking judicial review of final orders of deportation, exclusion, or removal. *Alvarez-Barajas*, 418 F.3d at 1052. The Act adopted the following express limitation on federal habeas jurisdiction:

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of Title 28, or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or

1 nonstatutory), to review such an order or such questions of law or fact.
2 8 U.S.C. § 1252(b)(9). Accordingly, the Act eliminated habeas jurisdiction, in favor of review
3 in the circuit courts, over any habeas petition that seeks judicial review of any final order of
4 removal as well as any petition seeking review of any questions of law and fact arising from
5 any action taken or proceeding brought to remove an alien.

6 Here, petitioners seek reissuance of the BIA's order, so that he may pursue the sort of
7 appeal contemplated by the REAL ID Act. This, the Court concludes, places this case outside
8 the restrictions of the Act, for two reasons. First, petitioners' petition for review to the court of
9 appeals is presently barred due to their counsel's failure to properly calendar a filing deadline.
10 Second, this habeas petition does not seek review of the final order of dismissal; rather it
11 seeks reinstatement of petitioners' right to seek review in the manner contemplated by the
12 REAL ID Act. Under these circumstances, the Court concludes that the REAL ID Act does
13 not preclude this Court's jurisdiction over this action. *See Singh v. Gonzales*, 499 F.3d 969,
14 977-80 (9th Cir. 2007); *Dearinger v. Volkova*, 232 F.3d 1042 (9th Cir. 2000).

15 D. The Merits of the Habeas Petition

16 In *Dearinger*, the court found ineffective assistance of counsel, resulting in a violation
17 of the petitioner's right to due process of law, as grounds for issuance of a writ of habeas
18 corpus directing the BIA to reissue its final order, recommencing the petitioner's time to
19 appeal. The court noted that "while deprivation of direct review of a deportation proceeding
20 in the Ninth Circuit may not violate the Constitution, there may still be a constitutional violation
21 if there was ineffective assistance of counsel." *Dearinger*, 232 F.3d at 1046.

22 To show a due process violation under these circumstances, a petitioner must show
23 "assistance [of counsel] that was so ineffective as to have impinged upon the fundamental
24 fairness of the hearing in violation of the fifth amendment due process clause." *Id.* at 1045,
25 citing *Magallanes-Damain v. INS*, 783 F.2d 931, 933 (9th Cir. 1986); *Lata v. INS*, 204 F.3d
26 1241, 1246 (9th Cir. 2000). Where a petitioner is denied an appeal as of right due to the

1 ineffective assistance of counsel, prejudice is presumed. *Roe v. Flores-Ortega*, 528 U.S. 470,
2 484 (2000) ("when counsel's constitutionally deficient performance deprives a defendant of
3 an appeal that he otherwise would have taken, the defendant has made out a successful
4 ineffective assistance of counsel claim entitling him to an appeal").

5 In this case, petitioners filed their petition for review one day late because their counsel
6 calendared the due date incorrectly. The petition was dismissed by the Ninth Circuit for lack
7 of jurisdiction. Clearly, the error of counsel caused the dismissal of petitioners' appeal.

8 With respect to its facts, this case is essentially the same as *Dearinger*. As in
9 *Dearinger*, petitioner received plainly ineffective assistance of counsel, resulting in forfeiture
10 of his right to appeal the removal order. The Court will deny respondents' motion to dismiss,
11 and will issue the writ of habeas corpus.

12 **IT IS THEREFORE ORDERED** that respondents' Motion to Dismiss (docket #8) is
13 **DENIED**.

14 **IT IS FURTHER ORDERED** that the Application for Writ of Habeas Corpus
15 (docket #1) is **GRANTED**.

16 **IT IS FURTHER ORDERED** that the Board of Immigration Appeals shall, within **45 days**
17 of entry of this order, reissue its decision in petitioners' removal proceedings.

18 **IT IS FURTHER ORDERED** that the Department of Homeland Security, Bureau of
19 Immigration and Customs Enforcement, is hereby **ENJOINED** from deporting petitioners or
20 otherwise acting upon the final order of removal until such time as petitioners have obtained
21 review of the reissued BIA decision by the Ninth Circuit Court of Appeals, or the time for
22 petitioning for such review has expired.

23 **IT IS FURTHER ORDERED** that the Clerk shall **ENTER JUDGMENT ACCORDINGLY**.

24 Dated this 21st day of March, 2008.

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UNITED STATES DISTRICT JUDGE